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In The Supreme Court of the United States

RAYMOND FRANTZ,

Petitioner,

v.

WILLIAM J. GRESS AND JOHN HANEJKO,

Respondents.

On Petition for Writ of Certiorari to the
United States Court of Appeals
for the Third Circuit

PETITION FOR WRIT OF CERTIORARI

J. Michael Considine, Jr.
Counsel of Record
12 East Barnard Street, Suite 100
West Chester, PA 19382
(610) 431-3288
Participating Attorney for
The Rutherford Institute

John W. Whitehead
Douglas R. McKusick
THE RUTHERFORD INSTITUTE
1440 Sachem Place
Charlottesville, VA 22901
(434) 978-3888

Attorneys for the Petitioner

LANTAGNE LEGAL PRINTING
801 East Main Street Suite 100 Richmond, Virginia 23219 (800) 847-0477

QUESTIONS PRESENTED

1. Whether police may prevent a citizen from engaging in First Amendment protected activity upon a public sidewalk under a statute which grants police the discretion to determine that the citizen's conduct renders the sidewalk "impassable without unreasonable inconvenience or hazard" and there is no narrowing judicial construction of the term "unreasonable convenience or hazard."

2. Whether a city ordinance which requires only persons engaged in handbilling and other activity protected by the First Amendment to remove litter attributable to that activity, but does not impose a similar requirement on persons engaged in commercial activity which creates a greater litter problem, violates the Equal Protection Clause of the Fourteenth Amendment.

3. Whether a defendant who is an eyewitness to events that are the basis of a complaint and has intimate knowledge of the facts set forth in the complaint should be deemed to have admitted facts alleged in the complaint when the defendant answers with only a general denial.

4. Since as a matter of law 3 persons standing abreast cannot blockade a sidewalk while peacefully protesting, where one person standing alone is arrested for leafleting religious materials on a 139-inch wide sidewalk, may judgment be entered on a claim under the First Amendment?

5. Was narrow tailoring exercised within a public forum where police arrest for peaceful leafleting that causes litter before taking less drastic alternatives such as calling in other police, instructing pedestrians where to walk or instructing that the litter be picked up?

6. May the trial court fail to make findings of fact as to why Petitioner was not credible where Respondents contradicted prior testimony, how the wide space was sufficiently impassable to support a conviction, how there was narrow tailoring regarding a police directive subject to strict scrutiny, why the equal protection claim failed and why there was no admission by general denial?

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App., *infra*, 1a-9a) is unreported. The opinion of the United States District Court for the Eastern District of Pennsylvania (Pet. App., *infra*, 10a-27a) is unreported.

STATEMENT OF JURISDICTION

The judgment and opinion of the United States Court of Appeals for the Third Circuit, which is the subject of the instant Petition, was entered on December 30, 2009. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

The First Amendment to the United States Constitution provides:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for redress of grievances.

The Fourth Amendment the United States Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, an no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Title 18, Pa. Cons. Stat. § 5507(a) and (c), provide:

> **(a) Obstructing**.--A person, who, having no legal privilege to do so, intentionally or recklessly obstructs any highway, railroad track or public utility right-of-way, sidewalk, navigable waters, other public passage, whether alone or with others, commits a summary offense, or, in case he persists after warning by a law officer, a misdemeanor of the third degree. No person shall be deemed guilty of an offense under this subsection solely because of a gathering of persons to hear him speak or otherwise communicate, or solely because of being a member of such a gathering.
>
> * * * * *
>
> **(c) Definition**.--As used in this section the word "obstructs" means renders impassable without unreasonable inconvenience or hazard.

Philadelphia Code § 10-723.1 provides:

> Every distributor, distribution business, or person who distributes or causes to be distributed commercial or non-commercial handbills upon any public place within the City, shall, at the end of the daily distribution, clear or cause to be cleared any discarded

handbills within a one hundred foot radius of the location where the handbills were distributed.

STATEMENT OF THE CASE

Petitioner Raymond Frantz brought this action in July 2006 in the United States District Court for the Eastern District of Pennsylvania. The complaint alleged that the Respondents, William J. Gress and John Hanejko, deprived Petitioner of his rights under the First, Fourth and Fourteenth Amendments and requested relief under 42 U.S.C. § 1983. The district court granted judgment in favor of the defendants on all claims after a bench trial. Pet. App. 10a-27a. Upon an appeal to the United States Court of Appeals for the Third Circuit, the judgment was affirmed. Pet. App. 1a-9a.

The action arises out of leafleting on the sidewalks of the City of Philadelphia, activity which is at the core of the protections granted by the First Amendment and which was undertaken within a traditional public forum. Petitioner, a window clerk and dispatcher for the U.S. Postal Service in Philadelphia for 27 years, began passing out religious tracts in 1984 in a campaign for Jews for Jesus and Jewish Outreach Partnership for the Philadelphia Area. Petitioner is diligent in following instructions he has received on how to leaflet: he stands to the side of the public sidewalk so he will

not interfere with passage. A-186-188, 505.[1] Once or twice a week, Petitioner passes out leaflets and always in a spot where he will not impede traffic. He has often passed out leaflets on the sidewalk at 9th and Market Streets, where the sidewalk is 18-20 feet wide. A-189-190, 276.

Petitioner never stands in the middle of the sidewalk and does not approach people, which might require them to walk around him. He stands to the side because he knows that people will not take tracts if he is in their way. Petitioner has followed this procedure countless times since 1984. On the nights in question in this case, Petitioner was giving out a tract titled "Live in the Light". Photographs in the record show the sidewalk at 4th and South Streets where he stood. A-191-195, 506, 517-518.

Petitioner has regularly seen trash and discarded papers around sidewalk vendors and stores abutting city sidewalks. He has often observed this when he leaflets and sees trash regularly in the area around stores and sidewalk vendors. There is more trash near stores and vendors than discarded handbills on the sidewalks. A-200-202, 519.

A. April 2005 Arrest

On April 9, 2005, Petitioner was distributing leaflets at the northeast corner of 4th and South

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[1] References to "A-(number)" are to pages of the appendix filed in the appeal to the Court of Appeals for the Third Circuit.

Streets in Philadelphia near a Starbucks store. The record shows that the measured width of the sidewalk where he was standing was 139 inches (11 feet, 7 inches). In its ruling, the district court alluded to the fact that the sidewalk was between 130 and 135 inches (about 11 feet). Pet. App. 10a. Although it made no specific finding on this point, neither did the court dispute that the width of the sidewalk was at least 11 feet. As he was distributing tracts, no one was unable to pass. Petitioner generally did not speak to passersby, but occasionally did say "the Word of God" or "God's word is free."

As Petitioner was doing this, Respondent Gress, a City of Philadelphia police officer, approached and said "you can't pass out these handbills on South Street. . ., you don't have the right to do this, . . . you have to get permission, . . . people are throwing these on the ground. You are creating a litter problem." Petitioner stated that he would pick up any leaflets that were on the ground when he was done and before he left the area. Two other officers then approached and, after speaking with Gress, told Petitioner "you heard what he [Gress] said" and told Petitioner "you will have to leave."

Petitioner then asked for Gress's name and badge number. As he reached to get a pen, Gress said "what is that, a weapon? . . . Turn around." The officers then arrested Petitioner, searched him and, at Gress's direction, handcuffed Petitioner. Before being handcuffed, Petitioner obtained Gress's name

and badge number, but not the other officers' identification. Petitioner was then transported to the police station and remained in handcuffs for 45 minutes. He was released after 90 minutes. A-202-213, 273-275. Petitioner's arrest stopped him from continuing to hand out tracts even though he wanted to continue.

While Petitioner disputed Gress's testimony that Petitioner was standing in the middle of the sidewalk at the time in question, even assuming Gress was truthful, there was still at least four feet of room on either side for people to walk by. No one stopped or walked into the street as a result of Petitioner's handbilling and people taking tracts continued to move along the sidewalk. While standing to the side, there was 9-10 feet of room on the sidewalk for people to pass; if someone wanted to get around the Petitioner there was sufficient room for them to do so on the sidewalk. No one had to change their path when they approached Petitioner as he distributed his religious tracts.

In accosting the Petitioner, Gress said "[l]ook at all the trash in the street because of you handing out this literature." Gress did not order Petitioner to move to the side or asked if he was done handbilling for the evening before the arrest.

Petitioner received a citation and paid $1,088. in legal fees in defending the charge. At a May 26, 2005 hearing, the district attorney amended the charges to include a charge of obstructing a sidewalk

under 18 Pa. Cons. Stat. § 5507(a). Petitioner was found guilty of that charge and of violating Philadelphia Code §10-723, which requires handbillers to clean up discarded handbills when they are finished. He was ordered to pay a fine and costs of $168.81. On his appeal of this judgment to the Commmon Pleas Court, all charges were dismissed.. A-111-114, 214-225, 274, 505.

B. June 2006 Incident

On June 18, 2006, Petitioner went to the same location at 4th and South Streets in Philadelphia. As he passed out leaflets, he stood to the side of the sidewalk as shown by a picture in the record (Ex. P-16).[2] Pedestrian traffic was light and no one complained he was obstructing the sidewalk.

At 1:15 a.m., Respondent Hanejko, a Philadelphia police officer, approached Petitioner and told him "you can't hand out this literature on South Street . . . at this location." Henejko never told Petitioner he was blocking traffic and there was no crowd. Hanejko said "if you don't leave you will be arrested . . ., you can't hand those out here." Petitioner showed his tracts to Hanejko and asked for the officer's name and badge number. Although Petitioner desired to continue handing out religious tracts, because of his prior experience and arrest, he decided not to keep leafletting.

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[2] "Ex." references are to exhibits submitted in the district court.

As with the 2005 incident, the Petitioner was not in the middle of the sidewalk when Hanejko approached. Petitioner was never told he was blocking the sidewalk; instead, Hanejko stated that Petitioner was "not allowed to hand out handbills" in that spot. Again, even if Petitioner had been standing in the middle of the sidewalk, there would have been sufficient room for people to pass around him on either side without being hindered in their passage. On a later date, Frantz was handbilling at 2nd and South Streets in the city, when he met Hanejko, who stated, in reference to the June 18, 2006 incident, "[n]o hard feelings." Petitioner took this to mean that Hanejko did not mean to do what he did. A-226-234, 280-282, 505.

As a result of these incidents, Petitioner now fears being arrested and will cease handbilling if told to by police, even if his activity is protected by the First Amendment. In both the April 2005 and the June 2006 instances, at the time Petitioner was told to stop handing out religious tracts the pedestrian traffic was moving and people were not unable to get by him. A-233-239. After June 18, 2006, Frantz did not return to South Street for six months and has been back to handbill there only once since that time. A-240-246.

At trial, a tape measure was stretched to 139 inches and Petitioner stood in the middle at 70 inches. On his right there was 65 inches of space, and on his left, 62 inches. With his hand fully extended, there was 42 to 43 inches on each side of

the Petitioner. His left hand extended would reach to the 98 inch mark. Thus, there would have been ample room for people to pass on either side: 64 inches to the right and 59 inches to the left. A-310-315. In his testimony, Gress admitted that 48 inches (four feet) would be sufficient room for an individual to pass by someone handing out leaflets. A-334-339.

At no time were people unable to get by the Petitioner on either night. Traffic moved by him the entire time in the 42 to 64 inches of space available on either side of Petitioner. A-233-239, 286-293, 306-315. The citation nowhere states people were stopped in the sidewalk. Between the building and Petitioner, people were walking by eastbound and westbound, not stopped. They were moving. They did not gather around him.

Gress also admitted that the Petitioner was cited for "his mannerism in how he handed out tracts," not solely for the littering. Moreover, Gress never asked the Petitioner if he was finished leafletting for the evening before the arrest and never requested that Petitioner pick up dropped leaflets, as would be required for a violation of Philadelphia Code § 10-723.1. A-353-357. Gress also did not dispute that the width of the sidewalk was 139 inches.

Tellingly, at the May 26, 2005 hearing on the charges, Gress stated as follows: "I observed Frantz [on] South Street in front of 347 . . . handing out pamphlets, . . ., walking up and down the sidewalk[.]

[T]he pamphlets were of religious material which is prohibited." A-358-363. Also, according to Gress, under the obstructing highways statute, "[i]f their passage was impeded . . [or] **they had to alter their passageway, that is obstructing the highway**." In Gress's opinion, it is an inconvenience if they had to alter their path even slightly. A- 370-377. When asked if people could have gotten around the Petitioner without going into the street, Gress replied "[s]**ome people could make it around him, some could not. It's not about what one person did or was able to do.** People were inconvenienced." A-378-384. Gress testified that if persons were "**inconvenienced or altered in their route**," this was a sufficient reason for a citation to be issued. A-391-394. Gress testified that "if somebody is trying to walk down the sidewalk and he is in front of him, that is obstructing their pathway." A-397-402.

Gress also had seen trash and wrappings littered near street vendors and places where food is sold many times and cited store owners for trash within 100 feet of their store. He admitted there is a problem with trash on sidewalks and in sewers other than leaflets. A-394-397.

Concerning the June 18, 2006, incident Hanejko told Petitioner he could not stand in the middle of the sidewalk and obstruct traffic because he could be arrested for obstruction of the highway if he continued to hand out tracts in that manner. Hanejko told Petitioner he could not stand in the

middle of the sidewalk but he could leaflet from the side. A-428-437. He stated that groups walked in both directions on the sidewalk; one group would have to stop to let the other go by. Some had to go around the Petitioner "in towards the street." Twice since this incident he saw Petitioner leafleting on the side of the sidewalk at 2nd and South Streets. Only once was Petitioner standing in the middle of the sidewalk. Hanejko asked Petitioner to move to the side of the sidewalk and "explained to him what he can and cannot do." At Hanejko's deposition, when asked "did you ask him to move to either side of the sidewalk?" he stated "'no. I told him what he can and can't do. He became irate and just left." "People decided to walk around Frantz into the street." A-465-475, 505.

C. District Court Proceedings

The Petitioner filed an action under 42 U.S.C. § 1983 against Respondents arising out of these incidents and alleging that Respondents had deprived Petitioner of his rights under the First and Fourth Amendments. Petitioner also alleged that Philadelphia Code § 10-723, one basis for his arrest in April 2005, is facially unconstitutional under the Fourteenth Amendment's Equal Protection Clause because it requires handbillers engaged in activity protected by the First Amendment to clean up discarded handbills, but does not impose a similar requirement upon vendors.

In the complaint as to Respondent Hanejko, the Petitioner alleged (1) the sidewalk was over 130 inches wide, (2) that Hanejko told Petitioner he could not leaflet there and that Petitioner must leave, and (3) that at no time did the Petitioner blockade pedestrian passage while resting against the fire hydrant. Respondent Hanejko's answer included a general denial and indicated he did not have sufficient information to confirm or deny the averments. A-143, 154.

After a bench trial, the district court entered findings of fact and conclusions of law. Pet. App. 14a-26a. It determined that the Petitioner's handbilling was activity protected by the First Amendment. Pet. App. 19a. However, as to the April 2005 incident involving Gress, the court found that the Petitioner had been properly requested to move from the middle of the sidewalk "so as not to impede pedestrian traffic." Pet. App. 22a. It found that the Petitioner had refused to comply with this request, and so Gress had probable cause to arrest the Petitioner. Pet. App. 23a.

As to the June 2006 incident involving Hanejko, the district court concluded that the Petitioner had not been seized in violation of the Fourth Amendment, Pet. App. 24a, but did not address the restriction on the Petitioner's First Amendment rights arising from Hanejko's instruction that the Petitioner move from where he was distributing handbills.

The district court also rejected Petitioner's equal protection challenge to Philadelphia Code § 10-723, holding that Petitioner had failed to present sufficient evidence at trial on this claim. Pet. App. 26a. There were no trial court findings of fact as to the equal protection claim, or how traffic could have been blockaded with 40 to 50 inches of space on either side and traffic was moving, or how narrow tailoring took place when no option but arrest attempted.

D. Court of Appeals Proceedings

An appeal of the district court judgment was timely brought before the Court of Appeals for the Third Circuit, which affirmed. It first held that Gress had probable cause to arrest the Petitioner after Petitioner did not move in response to Gress's requests that Petitioner not stand in the middle of the sidewalk. Pet. App. 5a. It also upheld the district court's judgment on the Petitioner's First Amendment claim, ruling that the restrictions imposed by Gress and Hanejko upon Petitioner's handbilling constituted a non-content based restriction on speech subject to intermediate scrutiny. Because the restrictions served a significant government interest (which the court did not identify) and left open to Petitioner other options for communication, the restrictions survived intermediate scrutiny. Pet. App. 7a. The court also affirmed the district court's conclusion that Philadelphia Code § 10-723 did not violate the

guarantee to equal protection of the law. Pet. App. 7a-8a.

The court of appeals also rejected Petitioner's argument that Hanejko should have been deemed to have admitted Petitioner's averments concerning the June 18, 2006 incident by responding to the allegations with a general denial. The court of appeals held that it would not consider this argument because Petitioner did not seek to exclude Hanejko's testimony. Pet. App. 8a.

REASONS FOR GRANTING THE PETITION

In rejecting the claims of the Petitioner, the courts below allowed the enforcement of state and local laws that are in clear opposition to the fundamental and supreme law of the land as set forth in the United States Constitution and as articulated in this Court's precedent. The rulings upheld the enforcement of a patently vague and indefinite law that was used to prevent a citizen from exercising his First Amendment rights within a traditional public forum. This Court has made clear that laws may not be so indefinite as to leave to police the unfettered discretion as to who may and may not exercise the right of free speech. Yet the decisions below upheld the application of a law which allowed the Respondent police officers to determine whether Petitioner's mere presence on a sidewalk constituted an "unreasonable inconvenience or hazard."

Moreover, in upholding the actions of the Respondents, the court of appeals refused to recognize that before silencing a person peaceably exercising their First Amendment rights, police must attempt to control the actions of third parties that may cause a public disruption. As such, it has placed itself in conflict with the decisions of other circuit courts, *see Glasson v. Louisville*, 518 F.2d 899, 906 (6th Cir. 1975) and *Sellers v. Johnson*, 163 F.2d 877 (8th Cir. 1947), further justifying the issuance of a writ of certiorari in this case.

The judgment below also conflicts with established precedent holding that the government may not treat expressive activities less favorably than similar activities that are not expressive. Here, the courts below upheld a city ordinance that imposes burdens upon leafletting activities on city sidewalks but did not impose a similar burden on non-communicative activities on sidewalks. The Equal Protection Clause forbids this kind of unequal treatment.

ARGUMENT

I. The Petitioner's First Amendment Rights Were Violated Because He Was Prevented From Passing Out Leaflets Under an Unconstitutionally Vague Statute

It was never disputed in this case that the activity the Petitioner was engaged in when arrested by Respondent Gress and ordered to move along by Respondent Hanejko was expressive activity at the core of the protections afforded by the Free Speech Clause of the First Amendment. Pet. App. 6a-7a, 19a-20a. Long ago, this Court established that "one who is rightfully on a street which the state has left open to the public carries with him there as elsewhere the constitutional right to express his views in an orderly fashion. This right extends to the communication of ideas by handbills and literature as well as by the spoken word." *Jamison v. State of Tex.*, 318 U.S. 413, 416 (1943). A fundamental premise to the guarantees of the First Amendment is that "public streets and sidewalks have been used for public assembly and debate" and are "the hallmarks of a traditional public forum." *Frisby v. Schultz*, 487 U.S. 474, 480 (1988). *See also United States v. Grace*, 461 U.S. 171, 177 (1983) (sidewalk in front of U.S. Supreme Court is a traditional public forum where the government's ability to restrict expression is very limited).

Moreover, when the speech at issue is religious expression, such as the Petitioner was prevented from engaging in, this Court has examined restrictions with particular care given the historic protections afforded religious speech. "Our precedent establishes that private religious speech, far from being a First Amendment orphan, is as fully protected under the Free Speech Clause as secular private expression. . . . Indeed, in Anglo-American

history, at least, government suppression of speech has so commonly been directed *precisely* at religious speech that a free-speech clause without religion would be Hamlet without the prince. Accordingly, we have not excluded from free-speech protections religious proselytizing[.]" *Capitol Square Review and Advisory Bd. v. Pinette*, 515 U.S. 753, 760 (1995) (emphasis in original). *Accord DeBoer v. Vill. of Oak Park*, 267 F.3d 558, 570 (7th Cir. 2001) (speech addressing religious matters is speech of the highest constitutional order).

When action is taken by governmental actors to restrict expression within a traditional public forum, such as the City of Philadelphia sidewalk at issue in this case, courts must act with vigilance in assuring that the power has been exercised in a manner consistent with the constitution. Particularly in the case of a law used to restrict speech activities, it must be clear that the law which is used to justify the restriction is not unduly vague; it must provide sufficient standards to alert citizens to what conduct is proscribe and must limit the discretion of enforcement officials. "Maintenance of the opportunity for free political discussion is a basic tenet of our constitutional democracy. . . . 'A statute which upon its face, and as authoritatively construed, is so vague and indefinite as to permit the punishment of the fair use of this opportunity is repugnant to the guaranty of liberty contained in the Fourteenth Amendment.'" *Cox v. Louisiana*, 379 U.S. 536, 552 (1965) (quoting *Stromberg v. People of State of California*, 283 U.S. 359, 369 (1931)).

In *Grayned v. City of Rockford*, 408 U.S. 104, 108-09 (1972) (footnotes omitted and citations omitted), this Court identified the policies behind the constitutional requirement that laws be sufficiently definite:

> Vague laws offend several important values. First, because we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. Vague laws may trap the innocent by not providing fair warning. Second, if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them. A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application. Third, but related, where a vague statute "abut(s) upon sensitive areas of basic First Amendment freedoms," it "operates to inhibit the exercise of (those) freedoms." Uncertain meanings inevitably lead citizens to "steer far wider of the unlawful zone". . .

> than if the boundaries of the forbidden areas were clearly marked.

Criticizing the vagueness of a law that prohibited loitering on a sidewalk so as to obstruct the free passage of pedestrians, this Court in *Shuttlesworth v. City of Birmingham*, 382 U.S. 87 (1965), commented that "[t]he constitutional vice of so broad a provision needs no demonstration. It 'does not provide for government by clearly defined laws, but rather for government by the moment-to-moment opinions of a policeman on his beat.'" *Id.* at 90 (quoting *Cox*, 379 U.S. at 579 (Black, J., concurring in part and dissenting in part)).

The delegation of unfettered, standardless discretion is precisely the vice of the Pennsylvania statute under which the Petitioner's right to free speech was infringed upon by the Respondents. The obstruction statute, 18 Pa. Cons. Stat. § 5507(a), addresses a problem that is certainly within the power of the government to regulate, but does so in a manner that leaves to the discretion of police, such as the Respondents, the ability to decide whether a persons has engaged in "obstruction." This is a direct result of the definition of "obstruct", which as used in § 5501(a) "means renders impassable without *unreasonable inconvenience or hazard*." 18 Pa. Cons. Stat. § 5507(c). What is "unreasonable" is left wholly to the whim and caprice of the police officer on the beat. Indeed, there has been no narrowing construction on this provision such that a limit on the discretion of officials could be implied. *Compare*

Shuttlesworth, 382 U.S. at 91 (unduly vague loitering statute may be saved by "explicitly narrowed construction" of an appellate court).

Section 5507 is little different from the ordinance found unconstitutional in *Coates v. City of Cincinnati*, 402 U.S. 611 (1971), which prohibited persons from assembling on sidewalks and conducting themselves in a manner "annoying to persons passing by." In striking down the statute, this Court stressed the effect it had on First Amendment rights, because it was applicable to the ability of persons to assemble and associate in a traditional public forum. *Id.* at 615. "In our opinion," the Court wrote, "this ordinance is unconstitutionally vague because it subjects the exercise of the right of assembly to an unascertainable standard, and unconstitutionally broad because it authorizes the punishment of constitutionally protected conduct." *Id.* at 614. While the Court agreed that the city had the authority to prevent and punish obstructions of the sidewalk and similar anti-social conduct, "[i]t cannot constitutionally do so through the enactment and enforcement of an ordinance whose violation may entirely depend upon whether or not a policeman is annoyed." *Id.*

Similarly, in *Cox v. State of Louisiana*, *supra*, this Court reversed a conviction under a statute prohibiting obstruction of public passages, where it was shown that officials allowed some persons to use passages for the kind of constitutionally-protected

demonstration engaged in by the Petitioner and for which he was convicted. After noting that there was nothing in the statute delineating which demonstrations are allowable and which are not, the Court held that

> [i]t is clearly unconstitutional to enable a public official to determine which expressions of view will be permitted and which will not or to engage in invidious discrimination among persons or groups either by use of a statute providing a system of broad discretionary licensing power or, as in this case, the equivalent of such a system by selective enforcement of an extremely broad prohibitory statute.

Cox, 379 U.S. at 557-58.

The circumstances of the instant case provide a stark illustration of the vagueness problem presented by the "unreasonable inconvenience" standard of 18 Pa. Cons. Stat. § 5507(a) and (c). While Petitioner denied that, as alleged by the Respondents, that he was standing in the middle of the sidewalk, even if that were true there was still plenty of room for persons to pass by the Petitioner while he handed out his tracts. The actions taken by the Respondents also cannot be justified on the basis that Petitioner created an unreasonable "hazard" because the evidence below showed that the abutting street was blocked to vehicular traffic so there was

no risk in walking into the street. A-253. Indeed, police orders on the sidewalk are subject to strict scrutiny, not intermediate scrutiny. *McTernan v. City of York*, 564 F. 3d 636 (3rd Cir. 2006). No less drastic effort to resolve any "obstruction," such as asking people to keep moving or stay out of the street was attempted: only arrest was attempted because "that's not my responsibility to make sure they can get around him." Gress made no effort to keep traffic moving. A-385-390, 505.

It was undisputed that the sidewalk where the Petitioner was handbilling was at least 11 feet wide. Pet. App. 10a. If a person stands in the middle of the sidewalk, this allows at least four feet on either side to pass. This is clearly plenty of room for a person to have walked past the Petitioner without being obstructed. Yet these Respondents, given the unfettered and standardless authority to determine what constitutes "unreasonable inconvenience," deemed that the Petitioner was in violation of § 5507(a) and so prohibited him from engaging in further expression.

Indeed, in his concurrence in *Shuttlesworth*, 382 U.S. at 95-96, Justice Douglas pointed out that, by definition and as a matter of law, a single person being present on a sidewalk cannot constitute "obstruction." "The ordinance, as it has been construed by the Alabama Court of Appeals, has been held to apply only to one who continues to block a sidewalk after a police warning to move. . . . There was no such 'obstructing' here, unless petitioner's

presence on the street was itself enough." Shuttlesworth, 382 U.S. at 96 (Douglas, J., concurring) (citations omitted). *Shuttlesworth* indicates that as a matter of law, three persons present on a sidewalk cannot constitute an obstruction. By the same token, the Petitioner's presence on the sidewalk, where there was fully 42 inches on either side for persons to pass by, could not have been an obstruction and was only deemed as such because of the unfettered discretion granted to police officers by the statute at issue.

It also is telling that Gress stated in previous testimony that the statute bars any standing in the middle of the sidewalk (regardless of actual obstruction), A-340-352, he deemed there to be a violation of this statute if a person's "passage was impede . . . [or] **they had to alter their passageway, that is obstructing the highway**." He also described a violation as occurring if persons "had to alter their path slightly." A- 370-377. Gress testified that "if somebody is trying to walk down the sidewalk and he is in front of him, that is obstructing their pathway." A-397-402. In sum, he deemed that the Petitioner was violating the statute because some "[p]eople were inconvenienced." A-378-384. Gress testified that if persons were "**inconvenienced or altered in their route**," this was a sufficient reason for a citation to be issued. A-391-394. Clearly, Respondent Gress had a view of "unreasonable inconvenience and hazard" that was entirely too broad and resulted in the suppression of constitutionally protected expression.

"Renders impassable without unreasonable inconvenience or hazard" must be limited, where expressive activity occurs, to include actual prevention of passage, *Pulice v. Enciso*, 39 Fed. Appx. 692 (3rd Cir. 2002), intent to obstruct, *Pennsylvania v. Ripley*, 833 A.2d 155, 161-162 (Pa. Super. 2003), a compelling actual safety hazard, *McTernan v. City of York*, 564 F.3d 636 (3rd Cir. 2006) or 2 traffic accidents, *Spitzer v. Operation Rescue National*, 273 F.3d 184 (2nd Cir. 2001). Otherwise, the discretion of police is unfettered.

Prevention of this kind of abuse of power at the expense of the exercise of fundamental liberties is precisely the goal of this Court's vagueness doctrine. Police must not be allowed to act in an arbitrary manner when they have the power to determine who may and who may not exercise First Amendment rights. *Grayned*, 408 U.S. at 108. Indeed, § 5507(a) itself evinces a legislative intent that expressive activity must be protected, by providing that a person is not to be deemed in violation of the statute simply because a crowd gathers as the person engages in activity protected by the First Amendment. The Petitioner's arrest by Respondent Gress and warning from Respondent Hanejko pursuant to the unduly vague provisions of 18 Pa. Const. Stat. § 5507 deprived the Petitioner of his rights under the First Amendment's Free Speech Clause. The lower courts' decisions on that no such deprivation occurred is contrary to this Court's

established precedent and a writ of certiorari should issue to reverse and correct the judgment below.

II. The City Code Provision Requiring That Only Those Engaged in Expressive Activity Remove Associated Litter From Streets and Sidewalks Improperly Discriminates Against First Amendment Activities

The Petitioner also was arrested by Respondent Gress under Philadelphia Code § 10-723.1, which requires every "person who distributes or causes to be distributed commercial or non-commercial handbills upon any public place within the City, shall, at the end of the daily distribution, clear or cause to be cleared any discarded handbills within a one hundred foot radius of the location where the handbills were distributed." By its terms, this anti-litter ordinance only requires that handbillers, i.e., persons who engage in either commercial or non-commercial speech, on the sidewalks of the City to clean up trash caused by this activity.

This is so notwithstanding the plain fact that enterprises that are not engaged in expressive activity cause similar litter problems. Indeed, Gress admitted as much. The records contains his statements that he often had seen trash and wrappings littered near street vendors and places where food is sold many times and that there is a

problem with trash on sidewalks and in sewers other than leaflets. A-394-397. Yet, City Code § 10-723.1 imposes only upon handbillers the obligation to police the area around their activity when their activity is finished.

It also is significant that all summary arrestees on South Street are handcuffed if they leaflet noncommercial leaflets, but are issued citations if it is a store causing trash on sidewalks. Gress told the latter to pick up trash before arresting, but not Petitioner. A-394-397, 403-410, 453-457. Gress immediately arrests all leafletters if there is littering nearby. Under this zero tolerance policy, if there was littering and the leafletter was present nearby he would be cited as they must maintain their area. A-340-352. Furthermore, Gress never asked if Frantz was through leafleting for the evening, even though Philadelphia Code §10-723 requires this before citations.

As such, § 10-723.1 imposes a special burden upon the exercise of expressive activity in violation of the Fourteenth Amendment's guarantee to equal protection of the law. In *Carey v. Brown*, 447 U.S. 445 (1980), this Court struck down an ordinance that drew a distinction between labor picketing, which was allowed, and other peaceful picketing as violative of the Equal Protection Clause. "When government regulation discriminates among speech-related activities in a public forum, the Equal Protection Clause mandates that the legislation be finely tailored to serve substantial state interests,

and the justifications offered for any distinctions it draws must be carefully scrutinized." *Carey*, 447 U.S. at 461-462 (citing *Police Department of Chicago v. Mosley*, 408 U.S. 92, 98-99 (1972)). Indeed, the discrimination at issue here is even more pernicious because § 10-723.1 singles out expressive activity for a special burden.

No justification for the distinction made by § 10-723.1 was suggested in the courts below, much less one that is finely-tailored and serves a substantial interest. To the contrary, the district court failed to conduct any factfinding on Petitioner's equal protections claim, Pet. App. 26a, while the court of appeals failed to appreciate the discriminatory distinction at issue. Pet. App. 7a-8a. Because this burden on expressive activity alone was not shown to be justified, the courts below should have struck down the law as unconstitutional.

III. Respondent's General Denial to Allegations in the Complaint Should Have Resulted in Deemed Admissions

Respondent Hanejko's general denial of facts in his pleading as to an incident to which he was an eyewitness and had vast knowledge was insufficient. Where the matter alleged is obviously one as to which a defendant had intimate knowledge or information, a general denial if not supplemented should be deemed an admission of the facts alleged. *Djourabchi v. Self*, 240 F.R.D. 5 (D.D.C. 2006); *Great*

White Life Assurance Company v. Levithan, 834 F. Supp. 858, 864-865 (E.D. Pa. 1993); 5 Wright & Miller, *Federal Practice and Procedure*, Civil 2d, §1263 at 393 (1990); Fed. R. Civ. P. 8(b).

Hanejko admitted he encountered Petitioner on June 18, 2008, but did not specifically deny (1) the sidewalk was over 130 inches wide, (2) that he told Petitioner he could not leaflet there and to leave, and (3) at all times Petitioner did not blockade pedestrian passage while resting against the fire hydrant; Hanejko gave only a general denial that he did not have sufficient information to confirm or deny the averments. A-143 & 154. When asked in an interrogatory for details about the incident, including the time, date, and location, Hanejko again simply admitted the general encounter occurred, but reserved his right to supplement his response by way of deposition testimony. A-120. This general denial was insufficient in light of his intimate knowledge of the incident and the averments, which included the width of the sidewalk and that Hanejko told Petitioner he could not leaflet in a public forum, should have been deemed admitted. The failure of the lower courts to rule for Petitioner on this point was prejudicial error and requires that the judgments below be reversed.

CONCLUSION

For the reasons set forth above, the Petitioner respectfully requests that a writ of certiorari should be granted in this case.

Respectfully submitted,

J. Michael Considine, Jr.
Counsel of Record
12 East Barnard Street
Suite 100
West Chester, PA 19382
(610) 431-3288
Participating Attorney for
The Rutherford Institute

John W. Whitehead
Douglas R. McKusick
The Rutherford Institute
1440 Sachem Place
Charlottesville, VA 22901
(434) 978-3888

Attorneys for the Petitioner

No. _____

In The Supreme Court of the United States

RAYMOND FRANTZ,

Petitioner,

v.

WILLIAM J. GRESS AND JOHN HANEJKO,

Respondents.

On Petition for Writ of Certiorari to the
United States Court of Appeals
for the Third Circuit

APPENDIX

J. Michael Considine, Jr.
Counsel of Record
12 East Barnard Street, Suite 100
West Chester, PA 19382
(610) 431-3288
Participating Attorney for
The Rutherford Institute

John W. Whitehead
Douglas R. McKusick
THE RUTHERFORD INSTITUTE
1440 Sachem Place
Charlottesville, VA 22901
(434) 978-3888

Attorneys for the Petitioner

LANTAGNE LEGAL PRINTING
801 East Main Street Suite 100 Richmond, Virginia 23219 (800) 847-0477

NOT PRECEDENTIAL

UNITED STATES COURT OF APPEALS,
THIRD CIRCUIT

NO. 08-4385

RAYMOND FRANTZ,
Appellant
v.
WILLIAM J. GRESS; JOHN HANEJKO

Appeal from the United States District Court
for the Eastern District of Pennsylvania
(D.C. Civil Action No. 2-06-cv-03210)
District Judge: Honorable Petrese B. Tucker

Submitted Under Third Circuit LAR 34.1(a)
October 1, 2009

Before AMBRO, GARTH, and ROTH Circuit Judges

(Opinion Filed: Dec. 30, 2009)

OPINION

AMBRO, Circuit Judge

Raymond Frantz appeals the judgment of the District Court against him and in favor of the defendants, Philadelphia Police Officers William G. Gress and John Hanejko.[1] As we discern no error in the findings of fact and conclusions of law entered by the District Court, we affirm.

I.

Frantz filed a complaint in July 2006 against Gress and Hanejko, alleging violations of his First and Fourth Amendment rights, malicious prosecution, and the unconstitutionality under the Equal Protection Clause of §§ 10-723 and 723.1 of the Philadelphia Code. Frantz has been distributing religious tracts since 1984 with an outreach campaign for Jews for Jesus and Jewish Outreach Partnership for the Philadelphia Area, and he bases his complaint on two specific incidents that occurred while he was attempting to distribute his leaflets at the corner of Fourth and South Streets in Philadelphia.

The first incident occurred on April 9, 2005. According to Frantz, he was standing close to the

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[1] Frantz's initial complaint named as a defendant "Officer Anenko," but the District Court granted Frantz's unopposed motion for leave to file an amended complaint replacing "Officer Anenko," who does not exist, with the proper officer, Officer Hanejko.

curb, not blocking pedestrian passage, when Officer Gress told Frantz that he could not pass out handbills and that he was creating a litter problem. Gress, in contrast, testified that Frantz was standing in the middle of the sidewalk, causing pedestrians either to walk into the street or get "shoved up against" the wall. Gress informed Frantz he could not hand out leaflets. When Gress realized Frantz was distributing religious leaflets, for which a license is not required, Gress instead asked Frantz to move nearer to the curb to avoid obstructing the pathway. Frantz refused to comply after two orders.

Frantz was arrested and taken to the police station. Gress issued a citation for improper distribution of handbills, in violation of Philadelphia Code § 10-723.[2] The District Attorney later amended the charges to include "Obstructing the Highway" under 18 Pa. Cons. Stat. § 5507.[3] Frantz was found

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[2] This section concerns distribution of commercial and non-commercial handbills on sidewalks, streets, and private property. Section 10-723.1 of the Code states:

> Every distributor, distribution business, or person who distributes or causes to be distributed commercial or non-commercial handbills upon any public place within the City, shall, at the end of the daily distribution, clear or cause to be cleared any discarded handbills within a one hundred foot radius of the location where the handbills were distributed.

[3] The crime of obstructing highways and other public passages in Pennsylvania is defined as follows:

guilty in Municipal Court of violating § 10-723, but Frantz testified that the charges against him were dismissed at the Common Pleas level.

On June 18, 2006, Frantz testified that he was standing near the curb at the same location when Officer Hanejko told Frantz he could not hand out literature and threatened to arrest him if he did not leave. Officer Hanejko testified that Frantz was not near the curb but was standing in the middle of the sidewalk, causing pedestrians either to veer into the street or run into the wall to pass him. Hanejko further testified that he did not tell Frantz he could not hand out literature, but instead informed him that he could be arrested for obstruction of the highway if he did not move to the side so as not to obstruct pedestrian traffic. Frantz grew angry and left.

After the District Court denied Frantz's motion for summary judgment, the case proceeded to a two-day bench trial. In June 2008, the District

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> A person, who, having no legal privilege to do so, intentionally or recklessly obstructs any highway, railroad track or public utility right-of-way, sidewalk, navigable waters, other public passage, whether alone or with others, commits a summary offense, or, in case he persists after warning by a law officer, a misdemeanor of the third degree.

18 Pa. Cons. Stat. § 5507(a). The term obstructs "means renders impassable without unreasonable inconvenience or hazard." *Id.* § 5507(c).

Court issued Findings of Fact and Conclusions of Law and entered judgment on all claims for Officers Gress and Hanejko. Frantz timely appealed.[4]

II

The District Court had jurisdiction over this case pursuant to 28 U.S.C. § 1331, and we have jurisdiction of this appeal pursuant to 28 U.S.C. § 1291.

This case comes to us after a non-jury trial. We review a District Court's findings of fact for clear error and its conclusions of law *de novo. Henglein v. Colt Indus. Operating Corp.,* 260 F.3d 201, 208 (3d Cir.2001). "We review credibility determinations, like other factual findings, under a clearly erroneous standard." *Grider v. Keystone Health Plan Cent., Inc.,* 580 F.3d 119, 137 (3d Cir.2009).

III

Frantz challenged his 2005 arrest on Fourth Amendment grounds, contending that it was not supported by probable cause. However, Gress had probable cause to arrest Frantz when he refused Gress's repeated requests to move from the middle of

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[4] Frantz does not appear to challenge the District Court's finding in favor of the defendants on his malicious prosecution claim. In any event, we find no error in the District Court's ruling on this claim, as probable cause existed for Frantz's arrest.

the sidewalk where he was obstructing the flow of pedestrian traffic.[5] Therefore, the District Court properly found that Frantz's claim fails.[6] Frantz's Fourth Amendment claim based on the 2006 encounter with Hanejko also fails, as we agree with the District Court that Frantz was not seized and therefore cannot show a violation of the Fourth Amendment.

Frantz also challenged the two incidents on First Amendment grounds. While "spreading one's religious beliefs or preaching the Gospel through distribution of religious literature ... is an age-old type of evangelism with as high a claim to constitutional protection as the more orthodox types," *Murdock v. Pennsylvania,* 319 U.S. 105, 110 (1943), the Government may impose reasonable restrictions

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[5] We accept the District Court's findings of fact on this issue, as they are not clearly erroneous and are supported by the officers' testimony. Frantz spends much of his brief arguing that he could not have interrupted pedestrian traffic given the width of the sidewalk. Whatever the sidewalk's precise measurements, the District Court credited the officers' testimony that pedestrians were forced against the wall or into the road because of Frantz's location on the sidewalk, and we will not disturb this determination. *See Anderson v. City of Bessemer City,* 470 U.S. 564, 574 (1985) ("Where there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous.").

[6] While Gress initially issued a citation for a violation of the Philadelphia leafleting ordinance, with the obstructing violation added later by the District Attorney, "[p]robable cause need only exist as to any offense that could be charged under the circumstances." *Barna v. City of Perth Amboy,* 42 F.3d 809, 819 (3d Cir.1994).

on the time, place, and manner of speech. *See McTernan v. City of York,* 564 F.3d 636, 646 (3d Cir.2009). The District Court found that Gress and Hanejko merely ordered Frantz to move from the middle of the sidewalk, nearer to the curb, so that pedestrians would not be forced to walk into the street or the wall. They did not order Frantz to leave or stop leafleting.

Where speech in a traditional public forum is limited without reference to the subject matter or viewpoint of the speech, as in this case, the challenged restriction is subject to intermediate scrutiny, and must be narrowly tailored to serve a significant governmental interest and leave open options for communication of information. *Id.* The District Court properly concluded this restriction survived intermediate scrutiny. Even under heightened scrutiny, which imposes a more stringent "narrowing" requirement than intermediate scrutiny, the officers' orders that Frantz move closer to the curb burdened his speech no more than was necessary. *See id.* at 655 (applying heightened scrutiny to a police directive issued by officers in the field).

Frantz sought to challenge on equal protection grounds the validity of §§ 10-723 and 723.1(1) of the Philadelphia Code, which require handbillers to clear discarded handbills at the end of daily distribution, because the statute does not require commercial vendors to clear litter they generate. However, commercial vendors are not similarly situated to

handbillers (and indeed are covered by different sections of the code). The sections challenged by Frantz apply to commercial *and* non-commercial handbillers. *See* Phila. Code § 10-723.1 (requiring "[e]very distributor, distribution business, or person who distributes or causes to be distributed commercial or non-commercial handbills upon any public place within the City" to dispose of them at the end of the day). Accordingly, Frantz's equal protection claim fails.

Frantz also claims that Hanejko "admitted" Frantz's version of critical events in his answer to the Amended Complaint and his interrogatory responses. Specifically, Frantz asserts that Hanejko improperly failed to deny certain facts in the complaint and should have been barred from testifying to any facts not contained in his interrogatory responses. Because Frantz did not seek to exclude Hanejko's testimony at trial, we do not consider this belated argument.[7] In any event, such a sanction likely would not have been appropriate. *See Quinn v. Consol. Freightways Corp. of Delaware,* 283 F.3d 572, 576 (3d Cir.2002) ("The exclusion of critical evidence is an extreme sanction, not normally to be imposed absent a showing of willful deception or flagrant disregard of a court order by the proponent of the evidence.") (quotation marks, citation, and alteration omitted).

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[7] Before trial, Frantz moved to compel an additional response to the interrogatory requesting details from Hanejko on the 2006 incident. The District Court denied this request, and Frantz did not seek to revisit this ruling at trial or preclude Hanejko from testifying.

Frantz also claims that the allegations in his Second Amended Complaint should be deemed "admitted" due to the officers' "failure" to file an Answer to that pleading. This argument is frivolous. Frantz filed his Second Amended Complaint *after* the bench trial to add the first name of Officer Hanejko and clarify that each defendant was sued in his individual capacity.

* * * * *

We thus affirm the judgment of the District Court.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT
OF PENNSYLVANIA

RAYMOND FRANTZ	:	
Plaintiff,	:	
	:	
v.	:	**CIVIL ACTION**
	:	**NO. 06-3210**
WILLIAM J. GRESS, ET AL.	:	
Defendants.	:	

Tucker, J. **June 10, 2008**

MEMORANDUM & ORDER

Plaintiff Raymond Frantz brings this action pursuant to § 1983, alleging violations of his First and Fourth Amendment rights, violations of 18 PA. CONS. STAT. ANN. § 5507(a)(2), and malicious prosecution. Plaintiff also brings an Equal Protection challenge as to the facial unconstitutionality of §§ 10-723, 10-723.1(1) of the Philadelphia Code because the statute treats handbillers differently than vendors of materials, products, or foods.

Specifically, Plaintiff alleges that he was leafleting religious materials at 347 South Street, Philadelphia, Pennsylvania on Saturday, April 9, 2005 around 11:45 p.m. Plaintiff maintains that the sidewalk was 130-135 inches wide and that he was standing within 1-1 ½ feet of the street side edge of the sidewalk. Plaintiff states that he was not

blocking pedestrian passage, did not give materials to passersby who indicated they did not want them, avoided arguments with passersby, cleaned up the area of distribution at the end of his leafleting, and was respectful and peaceful to all members of the public.

According to Plaintiff, Defendant Police Officer William J. Gress arrested and cited Plaintiff, without probable cause, for violation of Philadelphia Code Section 10-723, Distribution of Commercial & Non-Commercial handbills on sidewalks, streets and private property, for failing to clean up handbills daily at the end of the day within a 100-foot radius of the location where the handbills were distributed.

Plaintiff states that there were few, if any leaflets discarded within a 100-foot radius, that he picked up discarded leaflets periodically that night as he leafleted, that handbills were not clogging gutters in the area, and that Plaintiff had not reached the end of his leafleting when Defendant Gress arrested him. Furthermore, Plaintiff states that Defendant Gress did not ask Plaintiff if he was finished leafleting, did not instruct Plaintiff to pick up discarded leaflets when he was done, and did not tell Plaintiff to move out of the way of pedestrians.

Defendants counter that while patrolling, Officer Gress observed Plaintiff distributing leaflets while standing in the middle of the sidewalk. Officer Gress avers that he observed passing pedestrians who were forced to walk in the street or stop on the

sidewalk. Officer Gress also noted that a large amount of Plaintiff's pamphlets were in the gutters and sewers in Plaintiff's immediate vicinity. Gress avers that he approached Plaintiff and reviewed the material, then instructed Plaintiff to move away from the middle of the sidewalk and to stand in a manner that would not impede pedestrian traffic. Plaintiff refused to move. For 15-20 minutes, Plaintiff allegedly continued in his refusal to move to one side of the sidewalk, and was eventually arrested and cited.

On May 26, 2005, Plaintiff was convicted in Philadelphia Municipal Court of violating § 10-723. However, on appeal to the Common Pleas Court, all charges against Plaintiff were dismissed with prejudice.

On June 18, 2006, at about 1:15 a.m., Plaintiff alleges that Defendant, Officer John Hanejko, stopped Plaintiff from leafleting religious pamphlets on a public sidewalk at 4th and South Streets in Philadelphia. Officer Hanejko testified that he approached Plaintiff after observing a number of pamphlets on the ground. Hanejko avers that Plaintiff was in the middle of sidewalk handing pamphlets identical to those Hanejko observed lying on the ground. Hanejko explains that he instructed Plaintiff on his "rights and obligations with respect to leafleting religious material on a public sidewalk." Specifically, according to Defendant, he told Plaintiff that he was not allowed to obstruct the sidewalk or stand in the middle of the sidewalk and force his

material onto pedestrians. Hanejko claims that Plaintiff became irate upon hearing these instructions, asked for Hanejko's badge number, and thereafter left the area. Plaintiff testified that he left the area only to avoid arrest.

Plaintiff further challenges § 10-723 & 723.1(1) stating that it is facially unconstitutional because it violates the Equal Protection Clause of the Fourteenth Amendment. Section 10-723 & 723 .1(1) requires handbillers to clear discarded handbills within a 100 foot radius of the area of distribution at the end of the daily distribution, but do not require vendors of materials, products, or food to clear trash, wrapper, litter or refuse they generate within a 100 foot radius of the site of a sale. Plaintiff acknowledges that minimizing litter or trash and preventing the clogging of sewers and culverts are the ostensible purposes for the regulation. However, Plaintiff argues that handbillers are similarly situated to vendors whose customers may throw wrappers or other paper products to the ground.

This Court held a bench trial on February 19-20, 2008. The following constitutes the Court's findings of fact and conclusions of law. Fed. R. Civ. Pro. 52(a).[1]

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[1] Federal Rule of Civil Procedure 52(a) states in relevant part: "[i]n all actions tried upon the facts without a jury ... the court shall find the facts specially and state its conclusions of law separately."

I. FINDINGS OF FACT

1. In 1984, Plaintiff started distributing religious tracts with an outreach campaign for Jews for Jesus and Jewish Outreach Partnership for the Philadelphia Area ("JOPPA"). He was given instructions on how to leaftlet. (N.T. 2/19/08 16:16-17:1.)

2. All the leaflets that Plaintiff distributes are religious in subject matter.

3. On April 9, 2005, at about 8:30pm, Plaintiff was distributing religious printed material ("leaflets" or "tracts") on the 300 block of South Street in Philadelphia, Pennsylvania. (N.T. 2/19/08 35:14-16.)

4. There was a heavy flow of foot traffic. There were no fights or violence. Passersby did not speak to Plaintiff. Plaintiff did not preach but occasionally stated "the Word of God," "God's word," or "God's word is free."

5. Officer Gress was assigned to the 3rd Police District on April 9, 2005 with specific assignment to South Street district as a bicycle patrol officer. (N.T. 2/19/08 146:15-23.)

6. On April 9, 2005, Philadelphia Police Officer Gress observed Plaintiff in the middle of the sidewalk. (N.T. 2/19/08

146:21-23.)

7. The sidewalk was adjacent to a Starbucks Coffee Shop and on the northern side of South Street.

8. The sidewalk also had a fire hydrant, various newspaper boxes, and barricades; all of which were located on area of the sidewalk nearest to the street. Ex. P-16.

9. Officer Gress initially observed Plaintiff from the corner diagonal to the Starbucks. Officer Gress observed Plaintiff for approximately three to four minutes.

10. At the time that Officer Gress observed Plaintiff's location, there were numerous pedestrians attempting to negotiate the sidewalk adjacent to the Starbucks Shop. Several pedestrians, unable to continue on their path, abandoned the sidewalk and began to walk in the street. Other pedestrians attempted to pass Plaintiff by walking very close to the exterior wall of the Starbucks. Officer Gress also observed Plaintiff approaching pedestrians and extending his hand with leaflets.. (N.T. 2/19/08 153:4-19.)

11. Officer Gress approached Plaintiff and observed either a cross or a bible on the cover of a leaflet and determined that the

materials appeared to be religious in nature. (Id.)

12. Officer Gress requested that Plaintiff move from the middle of sidewalk to a location out of the flow of traffic and closer to the curb. (Id.)

13. Plaintiff refused to change his position on the sidewalk informing Officer Gress that he has a constitutional right to distribute his materials. (N.T. 2/19/08 158:25-159:10.)

14. Officer Gress again instructed Plaintiff to distribute his materials from a location closer to the curb. At a point in the verbal exchange between Plaintiff and Officer Gress, two other officers approached. (N.T. 2/19/08 85:22-86:2; 160:17-19.)

15. Plaintiff continued to refuse to alter his position on the sidewalk and was arrested. Plaintiff was removed from the area by the other officers. (N.T. 2/19/08 160; 10-14)

16. Plaintiff was issued citation No.2005-003198 for a violation of the Philadelphia Code Section 10-723, Distribution of Commercial & Non-Commercial handbills and transported to the police station. Plaintiff was detained for a total of ninety minutes.

17. The Police Report described Plaintiff's conduct as "standing in the middle of sidewalk and stopping people to hand them handbills causing them walk [sic] in the street creating a hazardous condition ...." (Pl.Mot.Summ. J. Ex. P10.)

18. The District Attorney amended the charges to include "Obstructing the Highway" under 18 Pa.C.S.A. § 5507 at the time of the hearing.

19. Plaintiff proceeded to trial in the Philadelphia Municipal Court and was found guilty. Plaintiff was also fined.

20. Plaintiff testified that he appealed the conviction. (N.T. 2/19/08 53:24-25.)

21. No evidence of the disposition of such appeal was presented by Plaintiff at trial.

22. On June 18, 2006 approximately 1:00am. Plaintiff returned to the 300 block of South Street in Philadelphia to distribute leaflets containing religious subject matter.

23. Officer Hanejko was assigned to the 3rd Police District on June 18, 2006 with specific assignment to the South Street district as a bicycle patrol office.

24. Officer Hanejko observed Plaintiff for

approximately five minutes from across Fourth Street where Officer Hanejko was on his bike patrol. (N.T. 2/19/08 3:16-23.)

25. Officer Hanejko observed Plaintiff standing in the middle of the sidewalk with his arm extended handing out leaflets. (N.T. 2/20/08 4:6-5:9.)

26. After observing "a picture of God or a cross" on the leaflet, Officer Hanejko determined that the leaflets were religious in nature. (N.T. 2/20/08 9:2-5.)

27. Officer Hanejko observed several pedestrians, unable to continue on their path, abandoned the sidewalk and began to walk in the street. Other pedestrians attempted to pass Plaintiff by walking very close to the exterior wall of the Starbucks. N.T. 2/20/08 4:6-5:9.)

28. Officer Hanejko thereafter approached Plaintiff and informed him that he could not stand in the middle of the sidewalk while distributing his materials, as he would obstruct the highway. (N.T. 2/20/08 4:21-5:5.)

29. Officer Hanejko did not instruct Plaintiff to leave the area or inform Plaintiff that he could not distribute his materials.

30. Plaintiff requested Officer Hanejko's badge number and thereafter left the area. (N.T. 2/20/08 5:6-9.)

II. CONCLUSIONS OF LAW

The following conclusions are entered:

1. Determining the credibility of witnesses is primarily the province of the factfinder. United States v. Booker, No. 06-1074, 237 Fed. App'x 782, 782 (2007)

A. First Amendment

2. "[S]preading one's religious beliefs or preaching the Gospel through distribution of religious literature and through personal visitations is an age-old type of evangelism with as high a claim to constitutional protection as the more orthodox types." Murdock v. Pennsylvania, 319 U.S. 105, 110 (1943).

3. However, principles of religious tolerance do not relieve any individual from complying with laws of general applicability, so the right of exercise does not relieve an individual of duty to comply with a valid and neutral law of general applicability. Employment Div. Dep't of Human Re. of O. v. Smith, 494 U.S. 872, 879 (1990), superceded by statute, Religious Freedom Restoration

Act of 1993, 42 U.S.C. § 2000bb.

4. "The principles of the First Amendment are not to be treated as a promise that everyone with opinions or beliefs to express may gather around ... at any public place and at any time a group for discussion or instruction." Poulos v. New Hampshire, 345 U.S. 395 (1953). Even though First Amendment rights are to be guarded, they may still be regulated by the state. "The rights of free speech and assembly, while fundamental in our democratic society, still do not mean that everyone with opinions or beliefs to express may address a group at any public place and at any time. The constitutional guarantee of liberty implies the existence of an organized society maintaining public order, without which liberty itself would be lost in the excesses of anarchy." Cox v. Louisiana, 379 U.S. 536, 554 (1965).

5. The government may impose reasonable "time, place and manner restrictions" on First Amendment activity to further significant governmental interests. Grayned v. City of Rockford, 408 U.S. 104, 115 (1972) (citing Cox v. New Hampshire, 312 U.S. 569, 575 (1941).

6. Where Defendants' restrictions on speech are content-based, those restrictions are subject

to the highest degree of scrutiny whereby they may withstand constitutional review only where they are narrowly tailored to achieve a compelling governmental interest. Capitol Square Review & Advisory Bd. v. Pinette, 515 U.S. 753, 761-62 (1993).

7. Protestors may be directed to espouse their message from a designated area. This is to ensure that their message will be seen and heard, and ensures that public safety and order will be maintained. Concerned Jewish Youth v. McGuire, 621 F.2d 471, 475 (2d Cir.1980).

8. Where speech moves beyond mere speech and into the realm of unlawful activity, the fact that the speaker was engaged in speech does not mean that probable cause for the arrest must be discounted or ignored. See Corbett v. Goode, No. 87-7379, 990 WL 181499 at *3 (E.D.Pa. Nov. 19, 1990); Armes v. City of Philadelphia, 706 F.Supp. 1156, 1163 (E.D.Pa.1989), aff'd,897 F.2d 520 (3d Cir.1990); see also Habiger v. City of Fargo, 80 F.3d 289, 295 (8th Cir.1996).

9. Officer Gress recognized that the materials that Plaintiff was distributing on April 9, 2005 were protected speech.

10. Officer Gress never asked Plaintiff to leave the area. Rather, he merely instructed

Plaintiff to change his position so as to not impede pedestrian traffic. This instruction was given so that Plaintiff could continue to distribute his pamphlets in accordance with the law.

11. When Officer Gress requested that Plaintiff move from the middle of the sidewalk, Officer Gress employed narrow tailoring of the law as he was attempting to restrict only as much of Plaintiff's activity as was necessary to protect the safety of the pedestrians on South Street.

B. Fourth Amendment

B.1 Officer Gress and the arrest on April 9, 2005

12. Courts determine if probable cause existed at the time of the arrest by evaluating whether "the facts and circumstances within [the officer's] knowledge and of which [he] had reasonably trustworthy information were sufficient to warrant a prudent man in believing that [the plaintiff] had committed or was committing an offense." Beck v. Ohio, 379 U.S. 89, 91 (1964) (citing Brinegan v. United States, 338 U.S. 160, 175-76 (1949); Henry v. United States, 361 U.S. 98, 102 (1959)) accord, Wilson v. Russo, 212 F.3d 781, 789 (3d Cir.2000) ("Probable cause exists if there is a 'fair probability' that the

person committed the crime at issue." (citing Harris v. City of Philadelphia, 35 F.3d 840-45 (3d Cir.1994))).

13. Probable cause to arrest requires more than a "mere suspicion," but it does not require that an officer possess sufficient evidence to prove guilt beyond a reasonable doubt. Orsatti v. N.J. State Police, 71 F.3d 480, 482-83 (3d Cir.1995). "It is not the function of the police to arrest only guilty persons; rather, the function of the police is to arrest persons based on probable cause." Mordan v. Siegfeld, No 94-0025, 1995 U.S. Dist. LEXIS 2507, at *7 (E.D.Pa. Feb. 27, 1995).

14. Officer Gress had probable cause to arrest Plaintiff on April 9, 2005 because Plaintiff refused Officer Gress's repeated requests that Plaintiff move from the middle of the sidewalk where Plaintiff was causing pedestrians to walk into the street or close to the wall of the Starbucks in order to avoid Plaintiff.

B.2 Officer Hanejko and the encounter on June 18, 2006

15. "[L]aw enforcement officers do not violate the Fourth Amendment by merely approaching an individual on the street or in another public place, by asking him if he is willing to answer some questions, by putting questions

to him if the person is willing to listen, or by offering in evidence in a criminal prosecution of his voluntary answers to such questions." Florida v. Royer, 460 U.S. 491, 497 (1983).

16. "If there is no detention-no seizure within the meaning of the Fourth Amendment-then no constitutional rights have been infringed." Royer, 460 U.S. at 498.

17. "The person approached, however, need not answer any question put to him; indeed, he may decline to listen to the questions at all and may go on his way." *Id.* at 498-99 (citing Terry v. Ohio, 392 U.S. 1, 32-33 (1968) (Harlan, J., concurring); id. at 34 (White, J., concurring).

18. Officer Hanejko had the right to engage in conversation with Plaintiff to instruct him on the proper ways to distribute materials according to the law.

19. Plaintiff was not detained during this brief conversation.

20. This was evidenced by the fact that Plaintiff chose to end the encounter and go on his way and was permitted to do so without further incident.

21. Without being detained, Plaintiff's Fourth Amendment rights could not have been

violated.

C. Malicious Prosecution

22. In Pennsylvania, as in most jurisdictions, a party bringing a malicious prosecution claim must demonstrate that (1) the defendant instituted a criminal proceeding; (2) without probable cause; (3) with malice; and (4) "that the proceedings were terminated in favor of the plaintiff." Strickland v. Univ. of Scranton, 700 A.2d 979, 984 (Pa.Super.1997) (quoting Cosmas v. Bloomingdale Bros. Inc., 442 Pa.Super. 476, 481 (1995)).

23. Plaintiff cannot properly sustain a claim for malicious prosecution.

24. Officer Gress had probable cause to arrest Plaintiff on April 9, 2005 because Plaintiff refused Officer Gress's repeated requests that Plaintiff move from the middle of the sidewalk where Plaintiff was causing pedestrians to walk into the street or close to the wall of the Starbucks in order to avoid him.

25. Plaintiff presented no evidence that Officer Gress acted with malice. Instead, evidence was presented that Officer Gress actually engaged in conversation with Plaintiff for five to ten minutes in an attempt to convince him to comply with the law and thus avoid

an arrest.

26. The criminal proceedings did not terminate in Plaintiff's favor. He was found guilty of the charges.

D. Equal Protection

27. Plaintiff seeks to challenge the validity of § 10-723 & 723.1(1) of the Philadelphia Code stating that it is facially unconstitutional because it violates the Equal Protection Clause of the Fourteenth Amendment.

28. Plaintiff has failed to sustain his burden of proof on this claim. Plaintiff offered insufficient evidence at trial on the unconstitutionality of §§ 10-723, 10.723.1(1) therefore, the Court cannot find in Plaintiff's favor on this claim. An appropriate Order follows.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT
OF PENNSYLVANIA

RAYMOND FRANTZ	:	
Plaintiff,	:	
	:	
v.	:	**CIVIL ACTION**
	:	***NO. 06-3210***
WILLIAM J. GRESS, ET AL.	:	
Defendants.	:	

ORDER

AND NOW, this _____ day of June, 2008, after a bench trial, pursuant to Federal Rule of Civil Procedure 52(a), **IT IS ORDERED that:**

1. **JUDGMENT** is **ENTERED** in favor of Defendant and against Plaintiff on Counts I-VI.

2. The Clerk of Court shall mark this case as **CLOSED.**

BY THE COURT

/s/ Petrese B. Tucker

_____

Hon. Petrese B. Tucker, U.S.D.J.